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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 776

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO,
PETITIONER

vs.

EASTERN AIR LINES, INC.,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Flight Engineers' International Association, EAL Chapter, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The *per curiam* opinion of the Court below (Appendix A, *infra*, p. 1a) is not yet reported officially; it is reported unofficially at 51 L.R.R.M. 2038.

The opinion of the District Court (Appendix B, *infra*, p. 2a) is not officially reported; it is unofficially reported at 50 L.R.R.M. 2929.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court below was entered on August 30, 1962. By an Order dated November 23, 1962,

this Court extended the time for the filing of a petition for a writ of certiorari in this cause to and including January 26, 1963.

Jurisdiction of the District Court was based upon 28 U.S.C. § 1337.

QUESTIONS PRESENTED

1. Is an air carrier subject to the Railway Labor Act, 45 U.S.C. §§ 151-188, free to effect unilateral changes in a collective bargaining agreement without first complying with Section 6 of the Act by serving upon the Union representing the employees a thirty-day notice of the specific intended changes and without exhausting, as to those specific intended changes, the procedures for conferences, mediation, and an Emergency Board provided for in Sections 5, 6 and 10 of the Act?

2. Does a Union waive the right to insist that the Section 6 notice be served, and that the other statutory procedures be followed, before the carrier may unilaterally implement specific intended changes, by having participated in collective bargaining negotiations and Emergency Board proceedings dealing with other issues in which the carrier's demands for changes as to which no notice had been served were unilaterally injected by the carrier over the protest of the Union against the failure of the carrier to comply with the notice and mediatory processes of the Act?

3. As a matter of law, under the Railway Labor Act may a good faith collective bargaining impasse between an air carrier and a representative of the employees be found to exist, thereby permitting the carrier to effect unilateral changes in working conditions and to deal individually with its employees, where the air carrier has not complied with the procedures of Sections 5, 6 and 10 of the Act with respect to those specific matters as to which unilateral changes are made?

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions of the Railway Labor Act involved in this cause are set out in Appendix C, *infra*, p. 22a.

STATEMENT

Petitioner, sometimes hereinafter referred to as EAL Chapter, is a labor organization duly designated by the employees and certified by the National Mediation Board as the collective bargaining representative of all employees of Respondent, Eastern Air Lines, in the class or craft of Flight Engineers. On December 31, 1958, EAL Chapter and Eastern entered into a collective bargaining agreement which was to continue in force until April 1, 1960, renewable thereafter on an annual basis unless written notice of intended change in the agreement was served by either party thirty days prior to April 1 of any year, as required by Section 6 of the Railway Labor Act, 45 U.S.C. § 156.

In February, 1960, EAL Chapter and Eastern, exchanged notices of intended changes in the Flight Engineers' Agreement pursuant to Section 6 of the Act and in accordance with the provisions of said Agreement. The changes covered by these Section 6 notices were limited to so-called "economic issues," namely, wages, hours and working conditions. In neither of these notices did Eastern or EAL Chapter seek to change Section II B 2 of the Flight Engineers' Agreement which requires all Flight Engineers to possess the special A & E license;[1] nor did these notices relate to any additional training, specifically pilot training, for Flight Engineers as a pre-condition to serving as Flight Engineers on jet aircraft; nor did these notices relate in any way to the "scope clause" of the Flight Engineers' Agreement, Section XIX H, which section requires a Flight Engineer from the seniority list of the EAL Chapter to be

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[1] Section II B 2 provides that: "Every Flight Engineer employed by the Company will be required to have a mechanics certificate, with power plant and air frame ratings (A & E license) or at the time of hiring he will be required to have the necessary mechanical background to obtain such certificate, and he shall be required to obtain such certificate prior to the completion of twelve months of active service as a checked out Flight Engineer with the Company. Failure to comply with the above will cause the termination of the Flight Engineers employment."

assigned as a crew member on certain aircraft.[2] In short, neither of these notices related in any way to those issues which have become known as the "crew complement" issues. With respect to these issues, both EAL Chapter and Eastern were content to continue in effect the contract provisions of the December 31, 1958, Flight Engineers' Agreement.[3]

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[2] Section XIX H provides that: "A Flight Engineer, who is included on the seniority list provided for and covered by this agreement, shall be assigned to, and serve at the Flight Engineer station on all flights, without regard to the type of equipment used and operated, in all instances when a cockpit flight crew member in excess of two is assigned to perform the flight engineering function. This agreement shall be applicable to all flights and to the operation and use of all types of equipment without regard to any other name or description by which the flight engineering function may be designated: Provided, however, that if the regulation of any government agency require that, in the use and operation of any specified type of equipment, all members of a minimum cockpit flight crew of three or more, on such equipment shall possess specified qualifications and /or specified licenses which are not solely incident or necessary to the performance of the flight engineering function, the member of such minimum crew who is to, or does, perform the flight engineering function shall be selected and assigned from the seniority list, covered by this agreement, of Flight Engineers, who may possess or acquire the qualifications and/or licenses required by such regulations: Provided, further that the Company will not enter into any collective bargaining agreement, with any other organization or association, covering employees who perform the flight engineering function so long as the certification of the Association as bargaining representative for such employees remains in effect: and Provided, further that "the flight engineering function" as used herein is defined to mean that function as it is generally known."

[3] By way of dicta the Court below suggested that EAL Chapter "may have opened" the crew complement issues by its own Section 6 notice, p. 14a, *infra*. This simply is not so. The suggestion is unfortunate and results from a misrepresentation of the facts by Eastern on oral argument. The "mediation agreement" was an agreement signed by Eastern in which it (1) agreed to withdraw pilot qualifications for flight engineers unilaterally imposed during the 1958 strike, and (2) agreed not to reimpose such qualifications without having first served a Section 6 notice upon EAL Chapter. Eastern has now abrogated this mediation agreement.

The "A & E waiver" reference is to a letter agreement signed many years ago in which EAL Chapter waived its right to have all flight engineers possess an A & E license for those few flight engineers who did not possess the license prior to the contractual re-

Extensive negotiations over the changes proposed by the Section 6 notices failed to produce a new agreement, and in July, 1960, under Section 5 of the Act, 45 U.S.C. § 155, the mediation services of the National Mediation Board were invoked on these "economic" issues. Fourteen months later, on September 5, 1961, the Board notified the parties that because the mediation services had produced no new agreement these services were being terminated. On February 22, 1962, the President of the United States established Emergency Board No. 144 under Section 10 of the Act, 45 U.S.C. § 160, to investigate the dispute and report to him its recommendations for settlement. The report of the Emergency Board was submitted to the President May 1, 1962.

During the 1961 negotiations between EAL Chapter and Eastern, Eastern injected into the negotiations on the "economic issues"[4] certain demands for changes in the collective bargaining agreement relating to "crew complement." Eastern insisted that the A & E license qualifications provided for in Section II B 2 of the Flight Engineers' Agreement be eliminated; that the "scope clause" of the Agreement also be eliminated; and that the Flight Engineers be required to obtain certain pilot training, in addition to Flight Engineer training, as a pre-condition to serving on jet equipment. EAL Chapter discussed these "crew complement" issues with Eastern; but at no time did it concede that by so doing it was starting in motion a process that would ultimately permit Eastern unilaterally to change the "crew complement" provisions or to take self-help in support of the changes it was seeking. On the contrary, EAL Chapter continued to insist that until changed by voluntary agreement, or by the procedures of the Act in-

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quirement in Section II B 2. This was a "grandfather rights" agreement only. It has nothing whatever to do with the current proposal of Eastern to eliminate the A & E license entirely.

By suggesting these two items be renewed without change EAL Chapter did not "open" them up generally under Section 6 of the Act. A Section 6 notice of "intended change" would have no meaning if the intent to renew without change also constitutes a Section 6 opener.

itiated with a proper Section 6 notice, the "crew complement" provisions of the agreement would remain unchanged.

In February, 1962, upon the appointment of the Emergency Board, Eastern claimed that the "crew complement" issues were open for presentation to the Emergency Board even though they had not been the subject of a Section 6 notice under the Act. EAL Chapter, on the other hand, argued that only those issues which had been the subject of the Section 6 notices in 1960 could be presented to the Emergency Board for its consideration and recommendations.

Despite the position of EAL Chapter, Eastern insisted upon presenting the "crew complement" issues to the Emergency Board. Because of its belief that the "crew complement" demands by Eastern were not a proper subject of negotiations and were not properly before the Emergency Board, EAL Chapter explicitly refused to present any evidence to the Emergency Board on these issues.

At the conclusion of the Emergency Board hearings, EAL Chapter again expressed its position on the Board's consideration of the "crew complement" issues: EAL Chapter conceded that the Board was obligated to make an investigation of the facts of the dispute between it and Eastern and report thereon to the President, and if it were the Board's judgment that the report to the President should include recommendations on the "crew complement" issues, there was no way EAL Chapter could prevent it from doing so. However, EAL Chapter made clear its position that while the parties would be free voluntarily to settle the "crew complement" issues in accordance with recommendations of the Emergency Board, the fact that such recommendations were made could not remove the statutory bar to unilateral changes by either party in the "crew complement" provisions of the agreement because the prerequisites to Board consideration and recommendations on these issues had not been met. The Board, in its report to the President, noted the position of EAL Chapter.

Following the report of the Emergency Board, EAL Chapter and Eastern continued to meet. Eastern, rather than directing its efforts toward a settlement of the "economic" issues, continued to divert attention of the negotiators to its "crew complement" demands. Settlement of the dispute and the execution of a new collective bargaining agreement were thereby frustrated. On June 23, 1962, EAL Chapter engaged in a work-stoppage against Eastern in support of its contract demands. This work-stoppage continues.

On July 18, 1962, while the strike was in progress, Eastern sent a letter to each striking Flight Engineer. This letter constituted an ultimatum to the effect that unless the strikers quit the strike and returned to work on or before July 24, 1962, under the same "crew complement" conditions EAL Chapter had refused to accept, each striker would be permanently replaced by copilots who were being recalled and were being given Flight Engineers' training. These copilots did not possess and are not required to possess an A & E license as required by the Flight Engineers' Agreement. Furthermore, these copilots were not selected from the Flight Engineers' seniority lists, as required by the "scope clause" of the Flight Engineers' Agreement. Thus, in two important respects Eastern had unilaterally modified the terms and conditions of the agreement with EAL Chapter, despite the fact that as to neither of those changes had a Section 6 notice ever been filed.

Five days after this ultimatum was served, the then Secretary of Labor, Arthur J. Goldberg, proposed a method for settling the dispute. Eastern immediately rejected the proposal. EAL Chapter, on the other hand, accepted the proposed settlement and agreed to return to work immediately, thus insuring prompt resumption of air transportation service by Eastern.

On July 24, 1962, only a few hours prior to the expiration of the time which the Flight Engineers had been given to accept the ultimatum of Eastern, EAL Chapter filed a complaint in the District Court and sought a temporary re-

straining order against Eastern, prohibiting Eastern from *inter alia:* (1) placing into effect changes in working conditions of Flight Engineers without first serving a Section 6 notice under the Railway Labor Act, and exhausting the procedures of Sections 5, 6 and 10 of the Act, and (2) bargaining directly with individual Flight Engineers. The restraining order was not granted, but an order to show cause why a preliminary injunction should not be entered was. On August 10, 1962, the District Court denied the motion of EAL Chapter for a preliminary injunction, in the opinion attached hereto as Appendix B. An immediate appeal was taken to the United States Court of Appeals for the Second Circuit. On August 30, 1962, the Court of Appeals in a *per curiam* opinion (Appendix A) affirmed the order of the District Court.

It is from this decision that Petitioner appeals to this Court.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Questions of the Utmost Importance To the Proper Interpretation and Application of The Railway Labor Act and the Administration of National Labor Policy Embodied Therein.

The Court below held that Eastern was free to put into effect its "crew complement" demands unilaterally and did not violate the Railway Labor Act in so doing, despite the failure of Eastern to give thirty days' written notice of intended change as required by Section 6 of the Act, and despite Eastern's failure to otherwise comply with and exhaust the mediatory and Emergency Board procedures of Sections 5, 6 and 10 of the Act with respect to those demands. The decision by the Court below held further that EAL Chapter waived its right to a Section 6 notice on the "crew complement" issues and its right to exhaustion of the procedures of Sections 5, 6 and 10 of the Act with respect to these "crew complement" issues by bargaining with Eastern over these issues.

The decision of the Court below is in conflict with the

plain wording and meaning of the statutory provisions involved, specifically Section 6 and Section 2, Seventh, and is in conflict with the decision of this Court in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944), wherein the Court said,

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the carrier's efforts to modify its terms through individual agreements were not effective." 321 U.S. at 347.

Section 6 of the Act provides that a carrier "shall give at least thirty days' written notice of an intended change . . ." Section 2, Seventh, of the Act provides that "no carrier . . . shall change . . . working conditions of its employees except in the manner prescribed in such agreements or in Section 6 of this Act." P. 22a, *infra*. The word "shall" can only be read as giving rise to a mandatory obligation on the part of Eastern. *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935). The requirements of Section 6 are mandatory ones rather than directory.

The legislative history of the Railway Labor Act indicates that the duties imposed by Section 6 are mandatory and must be strictly adhered to. The duty imposed in Section 6 was preceded by Title III of the Transportation Act of 1920 (41 Stat. 456). The provisions of that Act were considered inadequate to avoid interruptions to commerce. In 1922, a strike by railroad shop-men caused one of the most widespread and enduring strikes in the last fifty years. That strike arose out of the practice on the part of the carriers of contracting out to lower paying contractors work that would have otherwise been performed by their own shop-men. In 1924, the Railway Labor organizations sponsored the Howell-Barkley bill which contained provisions which proved to be the forerunner of those contained in Section 6, prohibiting changes in rates of pay, rules, or working conditions without notice and conferences with the representatives of the employees, hoping thus to avoid situations that had caused the shop-men's strike.

The chief witness appearing for the employees testified (Hearings Before the Subcommittee of the Senate Committee on Interstate Commerce, on S. 2646, 68th Cong., 1st Sess., pp. 19-20, 22):

> "Certainly the power on the one hand and fear on the other hand of arbitrary change will breed discord, not harmony. Therefore, it is provided in section 6 that either party shall give at least 30 days' written notice of an intended change and that a time and place of conference shall be agreed upon. Thereafter, a change is prohibited until the machinery for peaceful adjustment has been fully utilized . . .
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> "This prohibition against arbitrary action is a clear necessity in founding industrial peace upon contractual obligations."
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> . . . . . .
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> ". . . Take, for example, the situation which was the cause of the shop craft strike, one of the main causes of it was that the railroads contracted out entire shops without notice and the men were then told that if they wanted employment they would have to go to the private contractor, who then offered them a wage and working conditions entirely different from what had been in effect on the road. That was an example of arbitrary action."

In 1925 the representatives of the carriers and of organized railway employees agreed on a revised version of the Howell-Barkley Bill, which in 1926 was enacted as the Railway Labor Act of 1926.

The Court below did not consider this important legislative history, and in so doing failed to give the notice and other procedural requirements of the Act the significance intended by its sponsors. It is unlikely organized labor would have supported the legislation if it had known that the day would come when the procedural requirements it had struggled to obtain would be read out of the Act on the ground that to do otherwise is to "give precedence to form over substance." Appendix B, pp. 13a-14a, *infra*.

As already related above, p. 9, the Supreme Court long ago determined that conduct like Eastern's here of

failing to give a Section 6 notice of intended change is unlawful. The Court in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944), held *inter alia* that because the Company had failed to give the Union the required thirty days' written notice of intended change provided for in Section 6 of the Act the Company was barred from giving effect to the changes.

The decisions of the several Courts of Appeals are in accord with this decision of the Supreme Court. Without exception, until the instant case, the Courts of Appeals had held that the failure of a carrier to proceed in accordance with the provisions of Section 6 renders the changes null and void. In *Railroad Yardmasters of America* v. *Pennsylvania R. R.*, 224 F.2d 226, 230 (3rd Cir. 1955), the Court affirmed the issuance of a preliminary injunction by the lower court which had been in part based upon the finding by the District Court that the carrier had threatened changes in the collective bargaining agreement which had not been made in accordance with the thirty days' notice requirements of Section 6 of the Act.

See also *Rolfes* v. *Duellingham*, 198 F.2d 591 (8th Cir. 1952), and *Howard* v. *St. Louis-San Francisco Ry.*, 191 F.2d 442 (8th Cir. 1951), to the effect that a carrier violates the Railway Labor Act by failing to give the thirty days' notice of intended change required by Section 6 of the Act before putting into effect changes in the agreement.

Eastern, in addition to failing to serve the required thirty days' notice under Section 6, has failed to otherwise comply with and exhaust the other mandatory procedural requirements of Sections 5, 6 and 10 of the Act which are prerequisite to any unilateral change in the Flight Engineer Agreement of December 31, 1958.

Thus, Section 6 prohibits any change in the status quo until thirty days have elapsed after the termination of the mediation services of the National Mediation Board under Section 5 of the Act. Eastern has not even requested the mediation services of the Board under Section 5 with respect to the "crew complement" issues. The Board has not

proffered its mediation services with respect to these issues. No attempt by the Board has been made to get the parties to resolve their controversy by submitting it to arbitration under Section 5 of the Act. No Emergency Board has been appointed under Section 10 of the Act to investigate the "crew complement" issues. Eastern flouted these procedural steps when it put into effect the contract changes respecting these issues.

The decision of the Court below is contrary to the aforementioned decisions and conflicts with the plain language and meaning of the Railway Labor Act. A review of this case by the Supreme Court is necessary to insure that the statutory scheme of the Railway Labor Act for thirty days' written notice (Section 6), conference (Section 6), mediation (Section 5), and possible consideration by an Emergency Board (Section 10), is not abrogated in the Federal Courts by a decision which permits a carrier to put into effect changes in a collective bargaining agreement without first adhering to the provisions of the Act.

II. This Case Presents This Court With the First Occasion to Consider the Important Question of Whether the Requirements for Notice and Mediation Set Forth in The Railway Labor Act May Be Deemed to Have Been Waived Where the Party Complaining of the Failure to Comply With Those Requirements Has Participated in Negotiations and an Emergency Board Which, Over Its Objections, Dealt With the Issues as to Which the Statutory Requirements Had Not Been Met.

This case presents for the first time before this Court the question whether under the Railway Labor Act an air carrier may alter working conditions without having complied with the mandatory procedures of the Act simply because the carrier and the Union have engaged in bargaining over those issues at the behest of the carrier, and simply because the carrier was permitted to present these issues to an Emergency Board established to investigate a dispute between the parties. EAL Chapter submits that the decision below holding that Eastern has complied with the

Railway Labor Act, is clearly wrong and if permitted to stand will render havoc with labor-management negotiations under the Railway Labor Act, and thus defeats the primary statutory purpose of promoting labor-management peace in the railroad and airline industries.

EAL Chapter, by insisting that it is entitled to thirty days' written notice from Eastern indicating Eastern's intention to put the "crew complement" conditions into effect, and by insisting that the "crew complement" issues be processed through the mandatory procedures of mediation and Emergency Board consideration, is not attempting to "give precedence to form over substance," as held by the District Court (Appendix A, *infra*, pp. 13a-14a), any more than Congress intended Section 2, Seventh and Section 6 to serve no purpose whatsoever and should be read in such a way as to render their provisions directory rather than mandatory. Real meaning and substantive purpose are served by the notice requirements of Section 6 and by strict adherence to the other procedural requirements of Sections 5 and 10.

The substantive purpose served by Section 6 is obvious. The primary objective of the Act is to achieve peaceful settlement of labor disputes through negotiation, mediation and, where agreed to by the parties, final and binding arbitration. A Section 6 notice serves two related purposes: (1) it advises the other party and the National Mediation Board of the nature of the dispute, and (2) it defines the precise area in which, upon the expiration of the statutory waiting periods, "self-help" may be exercised.

Throughout the thirty-six years of collective bargaining experience under the Railway Labor Act, both sides could be assured, by virtue of Section 6 and Section 2, Seventh of the Act, of the specific confines in which the other side was free to exercise self-help, and could thus recognize those areas in which hard bargaining toward settlement was needed in order to avoid the economic consequences of the ultimate resort to self-help. To be sure, in many negotiations one party or the other has injected issues not raised

by a Section 6 notice. When that has been done, each side has recognized that while it is free to reach a settlement which deals with those issues, neither side may exercise self-help with respect to those issues until all of the procedures, beginning with a Section 6 notice, have been complied with. The decision of the Court below now comes to say, however, that when Section 6 notices have been filed dealing with issues A, B and C,[4] the injection by one of the parties of issue D at any time during the negotiations has the same effect as if a Section 6 notice were filed, and the only way that the other party can avoid that consequence is to refuse to even talk about issue D, and thereby risk breaking down negotiations on issues A, B, and C. And, if it does not refuse to talk about issue D, but discusses it briefly and then drops the matter, how can it be sure whether it will be found to have negotiated beyond the point where it can no longer object to the lack of a Section 6 notice?

The effect of the decision below is to create chaos in collective bargaining in the railroad and airline industries. Neither side can have knowledge of those areas, and on what issues, hard bargaining must be centered. Either party stands free to inject new issues, subsequent to the filing of a Section 6 notice specific and limited in its terms, into the negotiations. As the time at which the parties will be free to exercise self-help approaches, neither will be able to say with certainty on what issues the procedures of the Act have been exhausted and on what issues they have not. The likelihood of agreements resulting from collective bargaining conducted under such handicaps is nil. This is the antithesis of the result sought by the enactment of the Railway Labor Act.

In a closely related factual situation the Courts have indicated the importance of the parties being fully aware

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[4] It must be remembered that Section 6 of the Act does not merely establish the duty to serve a general notice of an intent to modify or open an existing agreement; it speaks specifically of the duty to serve a notice "of an intended change."

of the consequences of their failure to agree. In *Pittsburgh & Lake Erie R. R.* v. *Brotherhood of Railroad Trainmen*, 179 F. Supp. 271 (W.D. Pa. 1959), the Court faced the question whether under the Railway Labor Act the proffer of emergency mediation services by the National Mediation Board produced a second thirty-day cooling-off period after the procedures of the Act had otherwise been exhausted. The Court held that a second thirty-day cooling-off period was not contemplated by the Act. In so holding the Court cited with approval an *amicus curiae* brief filed by the National Mediation Board in which the Board noted the importance of the pressure upon the parties to the dispute when faced with expiration of the thirty-day cooling-off period. The Board stated:

> "In controversies of the type which come before the Board under Section 5, First, successful termination through mediation or arbitration requires some willingness by the parties involved to adjust or compromise the points in dispute. Realization that failure to achieve settlement will lead, or is likely to lead, to strike action at the end of a 30-day stand-still period puts upon both parties pressure to avoid the consequences of this kind of economic warfare, seriously injurious to each of them.
>
> . . . . . .
>
> "The Board regards its success in such emergency mediation as largely due to the pressures operating on both parties where the consequences of failure are both serious and immediate. This would not be the situation if failure of emergency mediation resulted in the starting of another 30-day waiting period." 179 F. Supp. at 275, 276.

See also *Pan American World Airways, Inc.* v. *Flight Engineers' International Association, PAA Chapter, AFL-CIO*, 50 L.R.R.M. 2801 (2d Cir. 1962).

Thus have the Courts recognized the importance to successful collective bargaining of the parties being apprised fully that a strike or self-help faces them if bargaining is not fruitful.

To an even greater degree is a peaceful settlement of a dispute dependent upon knowledge of the specific issues as

to which a party is free to unilaterally change upon the failure of negotiations and the expiration of the cooling-off period. The attention of the parties must be focused and their bargaining efforts given direction. Only if the dispute is so narrowed and kept within the confines of the Section 6 notice is agreement likely. To hold, as the Court below in the instant cause has held, that Eastern was free to effect unilateral changes without first serving a Section 6 notice and otherwise exhausting the mandatory procedures of the Act on the "crew complement" issues, can only result in a diversion rather than a concentration of efforts, and the unlimited expansion of the bounds of the dispute rather than the narrowing of the dispute.

It is no doubt true that the failure of EAL Chapter and Eastern to reach agreement in the instant dispute can be directly attributed to the fact that Eastern concentrated its efforts upon the "crew complement" issues, whereas EAL Chapter concentrated on the "economic" issues in the belief that the "crew complement" issues had not been properly opened under the Railway Labor Act and consequently could not be the subject matter of any self-help on the part of Eastern.[5] Had Eastern, like EAL Chapter, also concentrated its efforts on the "economic" issues, those issues which had been opened under the Railway Labor Act and those issues as to which either party was free to exercise self-help upon the expiration of the cooling-off period of the Act, settlement of the dispute between the parties would undoubtedly have been realized.

Petitioner submits that it was never contemplated by the framers of the Railway Labor Act that there could be a "waiver" of the requirement that each side notify the other of the specific scope of the issues as to which, at the end of the road, it would be free to exercise self-help or institute unilateral changes. But, whether or not Petitioner is correct in its view, it is clear that this question, which has

[5] As noted above, p. 6, EAL Chapter refused to agree to the submission of the "crew complement" issues to the Emergency Board and refused to present any evidence to the Emergency Board on those issues.

never been passed upon by this Court, is of critical importance in the future administration of the Act. For that reason alone, this Petition should be granted in this case.

III. The Decision of the Court Below Conflicts With Decisions of the Same Circuit, and With Decisions of Other Courts of Appeals.

A. The decision of the Court Below in holding that Eastern did not violate the Railway Labor Act by altering the "crew complement" working conditions of the Flight Engineers without first serving a Section 6 notice and without first otherwise exhausting the mandatory procedures of Sections 5, 6 and 10 of the Act, is contrary to every other Court of Appeals decision on this question.

Several Court of Appeals decisions contrary to the decision below have already been referred to above, p. 11. In addition to those, see also *Grand International Brotherhood* v. *Morphy*, 109 F.2d 576 (2d Cir.), cert. denied 310 U.S. 635 (1940), wherein the Court reversed a District Court decision and held that an ex parte order of the District Court, instructing the receiver of a railroad to alter the wages of the employees without regard to the procedures of the Act, was invalid. A thirty days' notice of intended change was held to be required, as was exhaustion of the mediatory procedures of Section 5.

There are, in addition, three District Court decisions to the same effect which are particularly illuminating. In the first, *Birmingham Trust & Savings Co.* v. *Atlantic, B. & A. R. R.*, 271 Fed. 731 (N. D. Ga. 1921), the Court held that under Section 9 of the Newlands Act of 1913, 45 U.S.C. §§ 101-125, a receiver of the railroad was forbidden from reducing wages of the employees without first complying with the twenty days' notice provision of the Act. This notice requirement, identical to Section 9 of the Erdman Act of 1898, 30 Stat. 424, is the predecessor of Section 6 of the Railway Labor Act. It is unlikely that, if notice provisions of this character were "formal technicalities" only, they would have survived the test of time. Obviously, notice provisions serve the substantive purpose of discour-

aging arbitrary and unilateral changes in rates of pay, rules and working conditions, of encouraging negotiation between the parties, and settlement of the dispute. This was totally ignored by the Court below. The resultant harm to labor-management relations on Eastern needs no spelling out.

The second District Court decision, *Railway Employees' Co-op Association* v. *Atlantic, B. & A. R.R.*, 22 F. Supp. 510 (D.C. Ga. 1938), involved a factual situation quite similar to that in the instant cause. The Railroad was a party to a labor agreement with the Co-op Association. Being more favorably disposed to bargaining with another (company dominated) union, the Railroad and this latter union entered into a new agreement which abrogated the terms of the Co-op agreement. No Section 6-notice had been given to the Co-op, nor had the other procedures of the Act been exhausted. Under such circumstances, the Court enjoined the giving effect to the new agreement as having been executed in violation of the Railway Labor Act.

In the third case, *Pullman Co.* v. *Order of Railway Conductors and Brakemen*, 49 L.R.R.M. 3162 (N.D. Ill. 1962), the Court held that a strike over new issues not the subject of a Section 6 notice or otherwise exhausted under the Act, would be in violation of the Railway Labor Act. The Court noted that the Conductors

> ". . . had raised new issues beyond the scope of any notice previously served . . . pursuant to Section 6 of the Railway Labor Act. As to the issues now in dispute between the parties the processes of the Railway Labor Act have not been exhausted." 49 L.R.R.M. at 3163.

B. The decision of the Court below in holding that Eastern, after exhausting the procedures of the Act on the "economic" issues and being free to exercise self-help with respect to those issues, was also free to exercise self-help on the "crew complement" issues is in conflict with a decision of the same circuit, but different panel, in *Pan American World Airways, Inc.* v. *Flight Engineers' Inter-*

national Association, PAA Chapter, AFL-CIO, 50 L.R.R.M. 2801 (2d Cir. 1962). In that case the issue was whether a threatened strike was in violation of the Railway Labor Act, and could be enjoined. Pan-American argued that, since the National Mediation Board had proffered emergency mediation services to the parties in an attempt to resolve the "crew complement" issues raised by Pan-American without the benefit of a Section 6 notice, a strike was barred even though the procedures of the Act had been exhausted over the "economic" issues. The Court held the Flight Engineers were free to strike on the economic issues, regardless of the status of the "crew complement" issues. Relying heavily upon *American Airlines* v. *ALPA*, 169 F. Supp. 777 (S.D.N.Y. 1958), Judge Hays wrote:

> "As was the case in *American Airlines* [169 F. Supp. 777] the strike of the Flight Engineers which has been enjoined is 'a strike with respect to the subject matter of the dispute which has been fully processed under the Railway Labor Act.' Pan-American's injection into the situation of the crew complement issue cannot be permitted to obscure the fact that the Flight Engineers struck only to secure the very demands which they made in their original Section 6 notice. Pan-American's reasons for refusing these demands are obviously not a part of what the Flight Engineers struck for." 50 L.R.R.M. at 2807.

Pan American stands for the proposition that the injection of "crew complement" issues into a dispute over "economic" issues cannot bar the parties, upon exhaustion of the Act on the "economic" issues, from exercising self-help with respect to these latter issues. Each set of issues in dispute between the parties must be treated separately; each must be processed through the procedures of the Act separately. The parties must exhaust the procedures of the Act on each independent of the other issues before standing free to exercise "self-help" with respect to each. A fusion of issues is not countenanced.

For the same reason, separate and independent treatment of issues under the Act, exhaustion of the Act by Eastern on "economic" issues does not leave it free to

place into effect the "crew complement" changes in working conditions, any more than exhaustion of the Act by the Flight Engineers on the "economic" issues leaves it free to strike on the "crew complement" issues.

IV. The Decision Below Is Contrary to National Labor Policy of Promoting Peaceful Settlement of Labor-Management Disputes Through Adherence to Statutory Procedures Designed for Such Purposes.

This Court should review the decision of the Court below for the additional reason that the decision represents a substantial departure from the National Labor Policy of enforcement of statutory procedures designed to achieve peaceful settlement of labor-management disputes through advance notice of intended change, negotiation, mediation and possible final and binding arbitration.

As already indicated, the Congressional scheme for settlement of labor disputes involving contract changes in the railroad and airline industries is embodied in Sections 5, 6 and 10 of the Railway Labor Act. All other industries are covered by the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 141 *et seq.* The Labor Management Relations Act, like the Railway Labor Act, contains detailed and specific notice procedures and "cooling-off" periods which must be adhered to by the parties to the dispute.

Section 8(d) of the Labor Management Relations Act, 29 U.S.C. § 158(d), provides in pertinent part that

> ". . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party

for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:"

Failure to comply with these strict notice and "cooling-off" provisions is, by virtue of Sections 8(a)(5) and 8(b)(3), an unfair labor practice, and subjects the non-complying party to a cease and desist order or, if a striking union is involved, to a loss by the employees of their status as employees protected by the Act.

The Courts and the National Labor Relations Board have construed Section 8(d) strictly. No "waiver" has been countenanced. The leading Board decision is *Retail Clerks International Association, Local No. 1179*, 109 N.L.R.B. 754 (1954), wherein the Board held that a strike, called more than sixty days after notice had been served upon the employer in compliance with Section 8(d)(1), was nevertheless illegal because the required notice to the Federal Mediation and Conciliation Service under Section 8(d)(3) had not been served. The Board disagreed with the conclusion of the Trial Examiner, that notice to the Mediation Service was a mere subordinate or an "ancillary" aspect of the statute, and held the provision is mandatory. In support of its conclusion, the Board reasoned,

> "As the legislative history bears out, the purpose of requiring notice to the Mediation Service is to provide for governmental mediation in the event the notice of intention to change the contract served upon the other party should fail to produce a mutual settlement of the labor dispute within a 30-day period. In that event, it is assumed, and experience has shown, correctly, that

> participation by the Federal Mediation and Conciliation Service will enhance the probability of a peaceful settlement of the dispute. This requirement that the parties to a labor dispute invite the assistance of a special service of the Federal Government is no doubt collateral to the negotiations by the principal parties. However, it is no less an integral part of the scheme evolved by Congress for achieving a higher degree of stability in collective bargaining." 109 N.L.R.B. at 758-759.

The *Retail Clerks* case has been uniformly followed by the Board. See *United Mine Workers of America, District 50*, 117 N.L.R.B. 220 (1957) (untimely notice held to same effect as if no notice at all had been given); *Local No. 156, United Packinghouse Workers of America*, 118 N.L.R.B. 670 (1957) (notice to state agency required even though the Federal Mediation and Conciliation Service had received notice of dispute over a month earlier and no settlement had resulted).

All of the Court of Appeals decisions construing Section 8(d) are in accord: the Section imposes mandatory obligations; the purposes of the Section are incapable of accomplishment unless the parties are held to a strict application. See *e.g. International Union of Operating Engineers* v. *Dahlem Construction Co.*, 193 F.2d 470 (6th Cir. 1951), wherein the Court found that a union had committed an unfair labor practice by failing to notify the Federal Mediation and Conciliation Service as required by Section 8(d)(3). The Court found the provision mandatory. The strike by the union was found illegal even though called after the "cooling-off" period.

These cases, interpreting as mandatory a statutory notice provision similar to Section 6 of the Railway Labor Act, stand for the proposition that parties to a labor-management dispute cannot treat the duty to serve the notices required by the statute as mere "formal technicalities." The reasons are clear: substantive purposes are served by these notice and "cooling off" provisions, namely greater likelihood that settlement will result.

For the same reasons that the Labor Board and the

Courts have interpreted Section 8(d) of the Labor Management Relations Act strictly, so should the Court below have read Section 6 of the Railway Labor Act to render Eastern's conduct unlawful. Unless the other party to a dispute is given forewarning of the confines of the issues on which self-help may ultimately be taken, and unless the mediation processes of the Railway Labor Act are brought to bear on those issues and given the opportunity to operate, industrial strife is likely, the statutory scheme is subverted, and the public interest suffers. The National Labor Policy does not tolerate these adverse consequences of the decision below.

Closely related to the central issue in this cause, and covered by the third of the three Questions Presented, as set forth above, p. 2, is the issue whether Eastern was free to enter into negotiations with the individual strikers. Petitioner does not challenge the general proposition, on which the Court below relied, that where a good faith impasse has been reached in collective bargaining, the carrier is free to resort to self-help (including, under appropriate circumstances, dealing directly with striking employees) in aid of its position in the dispute.[6] Petitioner submits, however, that, as a matter of law no good faith impasse can be found to exist concerning any issues as to which, as in this case, the requirements of Sections 5, 6, and 10 of the Act had not been met. This is a self-evident corollary of the proposition already discussed that these provisions of the Act establish mandatory requirements for notice and mediation on precise requested changes in the terms and conditions of employment.

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[6] Petitioner denies that, in terms of the standards by which this matter must be determined, there was a good faith impasse. This contention, however: (1) raises some issues of fact that Petitioner recognizes are not appropriate as a basis for certiorari, and (2) raises some issues of law that will be presented to this Court in a Petition for Certiorari in a related proceeding, *Flight Engineers' International Association, AFL-CIO, EAL Chapter, v. Eastern Air Lines, Inc. and Air Line Pilots Association*, 52 L.R.R.M. 2153 (2d Cir. 1962), which will be filed with this Court presently.

CONCLUSION

For the reasons set forth herein, this Petition should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 4 36—September Term, 1961

Argued August 21, 1962 . Decided August 30, 1962

Docket Number 27745

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION EAL CHAPTER AFL CIO, *Plaintiff*

against

EASTERN AIR LINES, INC., *Defendant*

Before LUMBARD, Chief Judge, Moore and Marshall, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York.

WILFRED FEINBERG, J., denying plaintiff's application for a preliminary injunction.

Affirmed.

PER CURIAM

We affirm the order of the District Court for the Southern District of New York, which denied the motion of the plaintiff for a temporary injunction restraining EASTERN AIR LINES, INC. from (1) putting into effect changes in rates of pay, rules and working conditions of flight engineers without first serving a Section 6 notice under the Railway Labor Act, 45 U.S.C. Sec. 151 et seq., and exhausting certain alleged requirements of the Act, and (2) bargaining directly with individual flight engineers now engaged in a strike against Eastern, for the reasons set forth in Judge Feinberg's thorough and well reasoned opinion.

APPENDIX B

Opinion of the District Court

FEINBERG, D. J.

This is a motion for a preliminary injunction by plaintiff union, Flight Engineers International Association, against defendant, Eastern Air Lines, Inc. It grows out of a tangled labor dispute involving effects of technological change, featherbedding and rival union jurisdiction. Both parties, at different stages of the lengthy negotiations, have exhibited something less than an acute awareness of the needs of the public. For the reasons set forth below, the injunction is denied. However, such denial of relief sought by the Flight Engineers reflects no approval of Eastern's action in refusing to accept the most recent settlement proposal of Secretary of Labor Goldberg, as set forth in the papers before me.

I

The facts as they appear from the verified complaint and Eastern's detailed affidavit in opposition[1] are the following. The Flight Engineers and Eastern entered into a collective bargaining agreement on December 31, 1958, to be effective the next day. This agreement was to continue in force until April 1, 1960, renewable thereafter on a yearly basis unless notice of a desire to change the agreement was served by either party on the other prior to April 1 of any year, as required by Section 6 of the Railway Labor Act, 45 U.S.C. § 156 (1958) (the "Act").[2]

On February 8, 1960, the Flight Engineers served upon

[1] The Flight Engineers submitted no affidavit in support of their motion.

[2] "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions. . . ." Railway Labor Act, § 6, as amended, 45 U.S.C. § 156 (1958). Such written notices of intended change are commonly referred to as "section 6 notices" in the transportation industries.

Eastern such a "section 6" notice.[3] Eastern responded by serving a similar notice four days later.[4] Both notices were couched in general terms, without articulation of the specific changes in the agreement desired by either party. However, in April 1960, the parties did exchange detailed proposals of changes desired in the agreement. After extensive negotiations based on these proposals failed to yield a settlement, the parties, in July 1960, resorted to the mediation services of the National Mediation Board, as provided for under the Act.[5] The case was docketed by the National Mediation Board in July, and the Board proceeded to mediate the dispute.

In the ensuing year, issues were injected into the negotiations which have since become the crucial ones and which were not included in the original "section 6" notices served in February 1960. Prior to that time, Eastern had signed an agreement with another union, the Air Line Pilots Association, which included provision for a cockpit crew of three pilots on jet planes. The government regulations applicable to Eastern's operations require that jet aircraft and four-engine propeller aircraft carry a basic cockpit crew of three airmen, two of whom must be qualified air pilots and one of whom must possess a Flight Engineer's Certificate issued by the Federal Aviation Agency ("FAA"). The contract between Eastern and the Flight Engineers provided that the latter would hold an FAA Airframe and Powerplant License ("A&P license"—sometimes called an "A&E license," the type required for ground mechanics) in addition to the FAA Flight Engineer's Certificate. The result of these contracts was that Eastern, along with other airlines, carried a basic cockpit

[3] The union's notice read, in substance: "Notice is hereby given . . . of the desire of the [union] to make certain changes in and additions to [the collective bargaining agreement] as of April 1, 1960."

[4] Eastern's notice read, in substance: "This is to advise . . . that the company also desires to make certain changes in our agreements with the Association."

[5] Railway Labor Act § 5, First, as amended, 45 U.S.C. § 155, First (1958).

crew of four men, one more than required by FAA regulations or desired by Eastern. Three of the four were pilots represented by the Air Line Pilots Association, and the other was a flight engineer, holding an A&P license, represented by the Flight Engineers.

On February 6, 1961, the National Mediation Board, in another case, held that pilots and flight engineers employed by United Air Lines constituted a single craft or class of employees for the purpose of collective bargaining under Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth (1958). On February 17, 1961, the Flight Engineers struck Eastern as well as several other airlines, seriously disrupting the operation of the nation's air transportation system. The strike ended shortly thereafter when, upon Secretary of Labor Goldberg's recommendation, President Kennedy established the so-called Feinsinger Commission to make recommendations with respect to a settlement of the parties' dispute over the crew complement problem. Both Eastern and the Flight Engineers (as well as the Air Line Pilots Association and other airlines) participated in the hearings before the Feinsinger Commission. The Commission issued a preliminary report on May 24, 1961, which stated, *inter alia*, that both the Flight Engineers and the Air Line Pilots Association agreed that a jet crew of three men was adequate and that:

> "The most obvious solution to this problem is merger or some form of consolidation [of the two unions]. In the considered opinion of the Commission, neither peace nor safety on the airlines will be fully assured as long as there are two unions in the cockpit."[6]

Failing to resolve the crew complement issue in a manner acceptable to all parties, the Feinsinger Commission made final recommendations to the President on October 17, 1961, for a solution to the issues before it.[7] From that time on, negotiations between Eastern and the Flight Engi-

[6] Feinsinger Comm'n. Report to the President, at 42 (1961).
[7] Feinsinger Comm'n. Report Supplementing a Report to the President (1961).

neers were concerned not only with the issues originally raised by the "section 6" notices but also with the crew complement issue. Negotiations on the latter were carried on both under the auspices of the National Mediation Board at that agency's request, and also with the assistance of Professor Feinsinger and Undersecretary of Labor Willard Wirtz. These negotiations continued intermittently until February 21, 1962. On that date, the Flight Engineers served a written strike notice on Eastern. The next day, President Kennedy, pursuant to Section 10 of the Act, 45 U.S.C. § 160 (1958), appointed Emergency Board No. 144 (the "Emergency Board") to "investigate certain unadjusted disputes" between Eastern and the Flight Engineers. On March 26, 1962, the Emergency Board convened hearings on the matter and filed its report on May 1, 1962.[9] Despite the Flight Engineers' opposition, the Emergency Board concluded that the issue of whether the recommendations of the Feinsinger Commission should be implemented had been submitted to it, and that those recommendations should be implemented by the Emergency Board since they were thought to be a "critical part of this dispute [between the parties]."[10]

Further negotiations between Eastern and the Flight Engineers failed to resolve the issues before them, and in late May the Flight Engineers served a strike notice effective at any time on or after June 1, 1962. On this date, thirty days after the Emergency Board report was issued to the President, the union was first legally free to strike under

[8] The Board, in September 1961, had notified the parties that the union had declined to arbitrate the question before it and, accordingly, the Board was terminating its services under the Act. It is not clear from the record whether Eastern also declined to arbitrate at that time. However, after the final recommendations of the Feinsinger Commission, the Board requested the Flight Engineers, Eastern and other airlines to meet with it on November 6, 1961, to seek "an amicable adjustment of unresolved issues including but not limited to the recommendations of the President's Commission on the airlines controversy."

[9] U.S. Emergency Board No. 144, Report to the President (1962).

[10] *Id.* at 6.

the Act, 45 U.S.C. § 160 (1958). In June, the parties met fruitlessly, and the Flight Engineers told Eastern that any new agreement had to provide that all men hired by Eastern in the future as flight engineers must have the A&P license, a position contrary to the Feinsinger and Emergency Board recommendations. Both parties, and the other airlines affected by the crew complement issue, were exhorted by Secretary Goldberg and President Kennedy in June to arbitrate all unresolved issues. On June 14, 1962, Eastern agreed to arbitrate but the Flight Engineers refused. On the same day, President Kennedy, at his press conference, strongly urged the Flight Engineers "to either submit this case to arbitration or agree with the carriers on some other means of settling this dispute without any interruption of operations."

Thereafter, the president of the Flight Engineers issued a press release which apparently "offered" to submit to arbitration unresolved, economic issues outstanding between Eastern and the union, although it expressly excluded submission of the crew complement issues. Further negotiations between the parties broke down shortly thereafter, and on June 23, 1962, the Flight Engineers struck Eastern. The day before, the National Mediation Board made a proffer of mediation to the union, which was rejected.

On June 23, 1962, the day the strike commenced, President Kennedy stated, among other things, that a sensible solution was open to both parties, and he cautioned the Flight Engineers that "to persist in the strike course would be the height of irresponsibility on their part." On the same day, George Meany, president of AFL-CIO, made an effort to avoid the strike and urged the union to resume negotiations. On June 25, 1962, at the request of the government, Eastern and the Flight Engineers met in Washington. A few days before, a strike between Trans World Airlines ("TWA") and the TWA chapter of the Flight Engineers had been settled. At the meetings in Washington, Eastern agreed to settle all unresolved issues, includ-

ing the crew complement dispute, on the basis of the TWA settlement. The Flight Engineers rejected the offer, and stated, in effect, that they would never give up the requirement of an A&P license.

On July 17, 1962, Eastern sent a letter to the president of the Eastern chapter of the Flight Engineers setting forth the severe economic losses it was suffering as a result of the strike. After stating that changed circumstances brought about by the strike necessitated modifications in offers previously made by Eastern to the union, Eastern withdrew its previous offers, and made modified proposals on the basis of which it would sign an agreement if the Flight Engineers accepted them in writing on or before July 18, 1962. The letter also stated that if acceptance were not received by 6 P.M. on July 18, Eastern would offer the same terms and conditions to all of the flight engineers; those who did not return to work on or before July 24, 1962 and agree to receive pilot-engineer training as recommended by the Feinsinger Commission would be permanently replaced as rapidly as possible. On July 19, 1962, Eastern called 80 jet copilots into immediate training to complete their qualifications for a Flight Engineer's Certificate. It also advised all Eastern flight engineers that anyone reporting to work on or before July 24, 1962 would not lose his job to any copilot receiving such training.

From July 17 to July 19, Eastern and the Flight Engineers met with Undersecretary Wirtz and Professor Feinsinger to consider the crew complement and other unresolved issues. On July 23, 1962, at the request of Secretary Goldberg, further talks were held. At their conclusion, Secretary Goldberg proposed a method for settling the dispute. According to the record before me, the Secretary recommended that the parties agree to arbitrate all unresolved economic issues. He did not recommend that the crew complement issue be submitted to arbitration, but proposed that "upon receipt of the arbitration award of the unresolved economic issues" the parties "will complete agreement regarding the crew complement issue with-

in the framework of the heretofore agreed-upon basic principles and subject to the concurrence of the Eastern Airlines Pilots." The Secretary stated that he and other governmental officials and agencies would assist the parties in reaching agreement on the crew complement issue, and that "any crew complement issue not resolved is to be finally settled by such procedures as they shall prescribe." Finally, the Secretary recommended immediate cancellation of the Flight Engineers' strike and resumption of operations by Eastern. The same day, Eastern informed the Secretary that it could not accept the proposal, principally on the ground that the solution to the crew complement issue was "still one that will not immediately include or definitely bind the pilots." It further stated that after strikes by the Flight Engineers over this very issue, "we cannot accept the solution that amounts to a 'truce' . . . with no assurance of pilot acquiescence."

The next day, the union accepted Secretary Goldberg's recommendation to submit the unresolved economic issues to arbitration. With regard to the crucial crew complement issue, the Flight Engineers proposed that the parties immediately "write an agreement . . . regarding the crew complement issues within the framework of the already agreed-upon basic issues." The Flight Engineers offered to return to work immediately upon conclusion of such an agreement.

On July 24, 1962, Secretary Goldberg asked Eastern to reconsider its action. Since then, further meetings have been held under the auspices of the Secretary of Labor, but have not produced any resolution of the issues of the basic dispute.

On July 23, 1962, Eastern resumed operations on an extremely limited basis. The strike has forced an almost complete shutdown of Eastern's operations, causing it to lose an estimated $1 million a day in revenue. As a result of the strike, Eastern has been forced to furlough approximately 17,000 employees, who have suffered a loss of $12 million a month in wages and benefits. The strike has re-

sulted in a serious reduction of the airline service received by the 115 communities normally served by Eastern, and has disrupted the travel plans of a large portion of the public.

II

The Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1958), provides detailed procedures for the settlement of labor disputes arising in industries covered by the Act. The procedures differ, depending upon whether "minor" or "major" disputes are involved. The former involve the interpretation and application of existing collective bargaining agreements; the latter concern the formation of terms and conditions of employment to be included in a new collective bargaining agreement governing the relationship between the parties. See, *e.g.*, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723-24 (1945); *Pan American World Airways, Inc.* v. *Flight Eng'rs Ass'n*, Nos. 27657-58, 2 Cir., July 25, 1962 at 2816. Since the issues in this case amount to a "major dispute," attention need only be given here to the Act's procedures for resolving such disagreements. These have been ably summarized by Judge Bryan in *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 784 (S.D.N.Y. 1958):

> "If either carrier or employees desire to make any change in the status quo with respect to conditions of employment, either under an existing collective bargaining agreement or in its absence, they must give 'at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions'. § 6.
>
> "Thereafter it is the duty of both parties under the mandate of Section 2 to confer and the Act directs that the time and place for the beginning of conference '*shall* be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice'. (Emphasis supplied.) § 6.
>
> "If the conferences fail either party may invoke the services of the Mediation Board which 'shall promptly put itself in communication with the parties' and 'shall

use its best efforts, by mediation, to bring them to agreement'. If these efforts are unsuccessful the Board 'as its final required action' (except as to the request for a Presidential Emergency Board) '*shall* at once endeavor * * *-to induce the parties to submit their controversy to arbitration'. (Emphasis supplied.) § 5, First. If both parties agree arbitration proceeds under § 7 and the resulting award is final and binding on the parties. If arbitration is refused, however, the Board '*shall*' notify the parties that its mediatory efforts have failed and 'for thirty days thereafter unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose'. (Emphasis supplied.) § 5, First.

"Finally, after being notified by the Mediation Board that a dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation', the President may create a Board which 'shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation'. After the creation of the Board, and for thirty days after it has reported to the President 'no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose'. § 10."

It should be noted that at no stage of the proceedings under the Act are the parties compelled to settle the dispute unless both agree to submit the issues to binding arbitration. See *Elgin, J. & E. Ry.* v. *Burley*, *supra*, at 722-28. See generally Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 Colum. L. Rev. 381, 385 (1960).

"For [the settlement of major disputes] . . . the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed

> to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." [11]

The carrier, on the other hand, can effect no changes in the terms and conditions of employment pertaining to the dispute until the procedures of the Act are exhausted. Nor may either party resort to the use of economic weapons, i.e., "self-help," until the proceedings provided by the Act for major disputes are at an end.[12]

The union contends that the actions of Eastern, as outlined in its letter to it on July 17, 1962, and as effectuated on July 24 and thereafter, violated various sections of the Act. The union argues (1) Eastern has placed into effect changes in terms and conditions of employment without having first served a notice of intended change as required by Section 6 and Section 2, Seventh of the Act; (2) Eastern has bargained directly with flight engineers in violation of Section 2, Fourth and Section 2, Ninth of the Act; and (3) Eastern has executed agreements with individual flight engineers with the intended and ultimate effect of coercing them and otherwise interfering with the selection of their bargaining representative in violation of Section 2, Third and Section 2, Fourth of the Act.

With regard to the first contention, the union claims that since the crew complement and A&P license issues were not raised in Eastern's original "section 6" notice, no unilateral act on the part of the carrier changing the status quo could be legally instituted because the compulsory mediation procedures of the Act had not been exhausted with respect to those issues.

In the recent case of *Pan American World Airways, Inc.*

[11] Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 725 (1945).

[12] See Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54, 58 (9 Cir.), *cert. denied*, 361 U.S. 864 (1959); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777, 789 (S.D. N.Y. 1958).

v. *Flight Eng'rs Ass'n, supra*, the Court of Appeals dissolved an injunction obtained by Pan American in the District Court against the Flight Engineers' strike of the carrier. Pan American apparently contended that the strike was illegal either because no "section 6" notice was served by either party with reference to the crew complement problem and the mediation procedures of the Act had not been complied with, or, in the alternative, that Pan American's "acceptance" of the recommendations of the Feinsinger Commission on the crew complement issue, some 16 or 17 months after the original "section 6" notices, constituted a new "section 6" notice on that issue, which set in motion the procedures of the Act not theretofore exhausted prior to the strike. The Court of Appeals, in a 2-1 decision, rejected the contention that "one of the parties to the procedures under the Railway Labor Act can, after those procedures are once exhausted, set them in motion for a second time by the service of a Section 6 notice raising new issues." *Pan American World Airways, Inc.* v. *Flight Eng'rs Ass'n, supra* at 2820. Further, the logical extension of such a conclusion would mean that "each new dispute on which the parties served appropriate 'openers' would set in motion the machinery of the Railway Labor Act all over again with respect to a dispute in which the procedures of the Act had already been fully exhausted. Thus the right of the Union or the employer to use the economic pressures of strike or lockout which are forbidden only during a period when the parties have not fully performed their duties and obligations under the Act, could be postponed indefinitely." *American Airlines, Inc.* v. *Air Line Pilots Ass'n, supra* at 797.

Therefore, under *Pan American*, injection of the crew complement and related issues by Eastern after the "section 6" notices had been served could not, by starting the Act's processes all over again, prevent the Flight Engineers from striking. But having raised these issues, and the union having struck, is Eastern foreclosed, as the union contends, from changing the terms and conditions of em-

ployment? Under the circumstances of this case, I think not. This is not a situation in which the employer raised the crew complement issue for the first time after the union went on strike, where different considerations might be involved. Rather, the employer here is in the same position as the employer was in *Pan American*, where no formal "section 6" notice was ever filed, but the employer "accepted" the recommendations of the Feinsinger Commission report and the issues were the subject of extended application of the Act's procedures. To allow a union but not an employer "self-help" in that situation is a possible but unattractive result, which stacks the deck heavily in favor of one of the parties to a labor dispute after a strike has started. I do not believe such a result is required by the Act.

The crucial question in this context is: have the parties negotiated with respect to those fundamental issues dividing them within the context of the "major dispute" proceedings under the Railway Labor Act? I find that they have, and an impasse has been reached as to them. While it is true that the crew complement and A&P license issues were not included in Eastern's original "section 6" notice, there is no doubt that these issues were the crucial elements of the dispute which divided the parties during the extensive bargaining since February 1961, when the Flight Engineers actually went out on strike because of these issues. On the record before me, it is clear that the primary cause of this labor dispute and the current strike was the crew complement problem and its related issues. Although there may have been a technical deficiency in the manner in which these issues were injected into the dispute, such technicalities cannot mask the fact that these issues have been a subject of negotiation since February 1961, and as to them, the processes of the Act have been exhausted. To allow either party to block resort to "self-help" after the exhaustion of the Act's procedures by relying on a technical omission from the original "openers" of issues fully discussed and negotiated would give precedence to form over

substance. After protracted negotiation and mediation on these issues, an impasse was reached, and at that stage, it would appear that the purposes of the Act, which attempts "to avoid any interruption to commerce" and "to provide for the prompt and orderly settlement of all disputes" had been fulfilled. They could not have been implemented further by a subsequent service of a new "section 6" notice, even though such service might cure what may have been a technical omission to comply with the formalities of the Act. To require compliance with such formality would, under the circumstances of this case, only defer the possibilities of settlement. See *International Air Line Pilots Ass'n* v. *Southern Airways, Inc.*, 44 CCH Lab. Cas. ¶17,469 at 26,220 (M.D. Tenn. 1962), *appeal docketed*, Nos. 15021-22, 6 Cir., May 17, 1962. Moreover, it may be that such formal technicalities were fulfilled here. From the Flight Engineers' original proposals of April 1, 1960, it appears that they may have "opened" the crew complement problem themselves.[13] If so, the alleged technical deficiency would disappear from the case.

Finally, it can be argued that, under the circumstances of this case, the union waived any technical deficiency of compliance with the Act's requirements with respect to these issues. While the Act does not, by its terms, specifically speak of waiver, the doctrine would appear applicable when justified by the facts. See *Childers* v. *Brotherhood of R.R. Trainmen*, 192 F.2d 956, 959 (8 Cir. 1951); *International Air Line Pilots Ass'n* v. *Southern Airways, Inc.*, *supra*, at 26218-19. It would seem that the union's extensive participation in negotiation and mediation proceed-

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[13] The copy of the union's original proposals attached to its complaint includes, at page 16:

"3. Mediation agreement on withdrawal of pilot qualification—renew without change.

"4. A and E waiver—renew without change.

"5. On all straight jet aircraft, on all flights, on all routes or route segments a second Flight Engineer will be assigned and carried on as an operating crew member. Such Flight Engineer shall be subject to all provisions of this Flight Engineer working agreement."

ings during which the crew complement and related issues were thoroughly discussed constituted a waiver of Eastern's failure to serve a "section 6" notice on those issues, since the union knew that no such "opener" had been served by Eastern.

III

Having decided affirmatively the question of whether Eastern could change conditions and terms of employment, the issues remain of whether, as the union charges, Eastern nonetheless improperly bargained directly with and coerced individual engineers.

If an employer and a bargaining representative reach a deadlock after exhausting the procedures established by the Act in an attempt to settle a "major dispute," "it is quite clear that the Act contemplates that further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without governmental intervention. The parties are then free from all compulsion under the Act and may resort to 'self-help'. . . ." *Pan American World Airways, Inc. v. Flight Eng'rs Ass'n, supra* at 2817-18. This rule does not appear to differ from the rule under the National Labor Relations Act ("NLRA") that in labor disputes classified as economic, resort to "self-help" is permissible when the parties' good faith bargaining reaches an impasse, see *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). The economic pressure to which the employer or union may resort is, of course, not unlimited, and here the Flight Engineers claim that Eastern resorted to unlawful pressure.

On July 17, Mr. J. O. Jarrard, Vice-President for Industrial Relations of Eastern, wrote to Mr. Jack Robertson, president of the Eastern chapter of the Flight Engineers. After briefly summarizing the long history of the attempts that had been made to solve the problems of "job security, qualification and representation of flight engineers," he described the impact of the strike: losses to Eastern of over $25 million, temporary unemployment of nearly 18,000

Eastern employees, and great inconvenience to the public. Consequently, the letter continued, the strike had altered the parties' circumstances, and Eastern was "compelled to take affirmative and positive steps to resume operation immediately." Therefore, Eastern proposed to begin immediate transition from four-man to three-man jet crews, with the third man to have the pilot training advocated by the Feinsinger Report. In place of the detailed solution to the crew complement issue suggested by the Report, Eastern simply offered to give the necessary pilot training to its flight engineers at its expense in the manner approved by the Report. Eastern also offered the flight engineers a 10.82% pay increase, apparently the increase it had proposed during the hearings before the Emergency Board [14] and recommended by the Board.[15] Eastern retreated from its apparent past willingness to grant both a limited retroactive pay increase and a prospective increase, effective on April 1, 1962.[16] Eastern further stated that it would be available to discuss its offer with the Flight Engineers for the balance of July 17 and July 18,[17] but that if the Flight Engineers rejected the offer, Eastern "[would] offer the same terms and conditions to all of the flight engineers individually." The offer was subject to the condition that only flight engineers who returned to work on or before July 24 would be given the appropriate pilot training at Eastern's expense. Strikers who did not return by that date would, "If re-employed by the Company, be restricted to service on propeller-driven aircraft and [would] not be given the training contemplated by the Feinsinger Report." Flight engineers who did not return to work "[would] be permanently replaced as rapidly as possible."

Thereafter, Eastern sent to each striking flight engineer a letter, dated July 18, signed by Mr. Malcolm MacIntyre,

[14] U.S. Emergency Board No. 144, Report to the President at 18 (1962).

[15] *Ibid.*

[16] *Id.* at 21.

[17] Discussions were held on July 17, 18 and 19 by the parties with the aid of Undersecretary of Labor Wirtz and Professor Feinsinger.

President of Eastern. Annexed to the letter was Mr. Jarrard's letter of the previous day to Mr. Robertson. Mr. MacIntyre reiterated that because of the impasse in negotiations and the great losses suffered by Eastern because of the strike, Eastern had to resume operations. Therefore, he stated, effective immediately, the "terms and conditions set forth on the attached letter of July 17, 1962 shall be applicable to all flight engineers [of Eastern]." In addition to instructing the strikers as to how and when any of them who wished to return to work could inform Eastern of their decision, Mr. MacIntyre stated that any engineer who did not elect to take jet pilot training would be restricted to propeller aircraft, and added, "Those who do not report by July 24th may be replaced and any who are reemployed thereafter will be restricted to propeller aircraft." On July 19, the strikers were informed by letter that to resume operations as quickly as possible, Eastern was calling 80 copilots into training as flight engineers. The copilots would be used as the third man in jet crews to the extent that such places were not filled by flight engineers who reported to work by July 24. The letter concluded that "these copilots will not take flight engineer jobs away from any present flight engineer who so reports." As of July 24, 1962, 53 flight engineers had accepted the offer of July 18, and received priority for the pilot-engineer's position in the three-man crew. The program of training 80 copilots as flight engineers was, as of the date of the hearing, well underway, and the cost of that program is estimated to be approximately $341,000.

The union argues that Eastern has attempted to bargain individually with flight engineers in violation of Section 2, Fourth and Section 2, Ninth of the Act, which require employers to bargain only with their employees' authorized representatives, and has coerced flight engineers in violation of Section 2, Third and Section 2, Fourth of the Act. The principal conduct of Eastern that might constitute individual bargaining consists of the company's letters of July 18 and July 19 to the strikers, which, according to the

record before me, are the only communications sent directly to them by the company. Eastern claims, and there is nothing in the record to the contrary, that it has negotiated only with the union and never with individual engineers. Accordingly, the Flight Engineers' entire argument on individual bargaining stands or falls primarily on Eastern's two letters to the strikers.

Eastern's letters both withdrew all previous offers to the strikers, and stated the terms upon which they could return to work. It does not appear that this conduct violated the Act. The terms relating to the crew complement issue upon which Eastern proposed to take back the strikers gave them less job protection than Eastern's previous offers. The cases under the NLRA that suggest a measure of Eastern's right to vary its offer indicate that Eastern's abandonment of some prior concessions under the circumstances of this case was not unlawful. See *Great Falls Employers' Council, Inc.*, 123 N.L.R.B. 974, 982 (1959), *enforcement denied on other grounds*, 277 F.2d 772 (9 Cir. 1960) ("Respondents bargained in good faith until an impasse developed on April 12, 1957, when the Union rejected Respondents' last amended offer and, on the following day, struck Buttrey, one member of the multi-employer unit. Thereafter, Respondents were relieved of any duty they may have been under to adhere to previously made bargaining concessions and were free to withdraw, as they did on April 15, 1957, their rejected 'final proposal' and to renounce the terms of the old, expired contract which had been continued in effect by mutual consent of both parties thereto.")[18] It is clear that Eastern's modification of its position neither created the deadlock in the parties' negotiations nor precipitated the strike. Eastern did not depart from its last, pre-strike offer until the strike was 25 days old. The cases decided under the NLRA

[18] *Cf.* NLRB v. Hart Cotton Mills, Inc., 190 F.2d 963 (4 Cir. 1951) (withdrawal of concession not evidence of bad faith); Stoner Rubber Co., 123 N.L.R.B. 1440, 1443 (1959) (lowering of wage offer not evidence of bad faith). Compare NLRB v. National Shoes, Inc., 208 F.2d 688, 692 (2 Cir. 1953).

and the apparent economic justification for Eastern's actions and absence of bad faith on its part compel the conclusion that Eastern's withdrawal of its last offer, linked with its new proposal, was not resort to unlawful "self-help."

Nor do I think unlawful Eastern's statement in its letters of the terms on which it invited the strikers to return to work. Initially communicated to the union on July 17, the new offer of July 18, when mailed to the strikers, amounted to no more than a unilateral statement of the terms on which the strikers could return to work if they wished. Plainly, "bargaining" with individuals was neither contemplated nor involved; there is no evidence that any resulted. Parenthetically, it should also be noted that the offer was in no way more advantageous to the flight engineers than Eastern's previous offers. Thus, the new offer was not the type of unilateral employer action taken with intent to weaken a union which, if taken in an economic dispute subject to the NLRA, would be deemed a violation of the duty to bargain in good faith. See *May Dept. Stores Inc. v. NLRB*, 326 U.S. 376 (1945); Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423-24 (1958), and cases cited therein.

Finally, was Eastern entitled to notify the strikers in its letters that if they did not return by a specified date they would be replaced as rapidly as possible, and that copilots would be trained to replace them; and did Eastern engage in permissible "self-help" when it began training the replacements? Once again, the precedents under the NLRA suggest solutions under the Railway Labor Act. The unfortunate impasse situation is the same, regardless of the statute involved. *International Air Line Pilots Ass'n v. Southern Airways, Inc., supra; cf. American Airlines, Inc. v. Air Line Pilots Ass'n, supra* at 793. In economic disputes under the NLRA, the employer who has bargained in good faith may, when an impasse is reached and a strike occurs, hire permanent replacements for striking employees. *NLRB v. Mackay Radio & Tel. Co., supra*, and cases cited immediately below. Furthermore, it may individually inform

the striking employees that they must either return to work on the basis of its last offer or face the threat of replacement. *Robinson Freight Lines*, 114 N.L.R.B. 1093 (1955), *enforcement granted*, 251 F.2d 639 (6 Cir. 1958); *Texas Co.*, 93 N.L.R.B. 1358 (1951), *set aside on other grounds*, 198 F.2d 540 (9 Cir. 1952); *Kansas Milling Co. v. NLRB*, 185 F.2d 413 (10 Cir. 1950).[19] Accordingly, I conclude that Eastern, under the circumstances in which it found itself, could hire and train copilots to replace the strikers. Eastern's letters informing the strikers of its intentions did not exceed the boundaries of lawful "self-help."[20] I find that on the evidence before me Eastern has not bargained directly with individual flight engineers, nor has it executed agreements with them with the intended and ultimate effect of coercing them and otherwise interfering with the selection of their bargaining represenatives.

IV

Eastern has also argued that the union has failed to comply with Section 8 of the Norris LaGuardia Act, 29 U.S.C.

[19] Cases have held that the employer may not notify the employees that the act of striking terminated their employment, see NLRB v. U.S. Cold Storage Corp., 203 F.2d 924 (5 Cir.), *cert. denied*, 346 U.S. 818 (1953), or that a failure to return to work by a specified date would constitute termination, see NLRB v. Beaver Meadow Creamery, 215 F.2d 247 (3 Cir. 1954) (alternative holding). Regardless of the distinctions, substantive or semantic, upon which these cases may turn, see Shopmen's Local 774 v. NLRB, 219 F.2d 874 (6 Cir.), *cert. denied*, 350 U.S. 835 (1955), no such problems are presented by Eastern's letters.

[20] The cases cited by the union are not to the contrary. They involved employers who dealt in the first instance with individual employees rather than their representatives. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342 (1944), an employer who refused to bargain collectively with a newly certified representative because of the existence of contracts previously made with individual employees, J. I. Case Co. v. NLRB, 321 U.S. 332 (1944), an employer who by organizing a company union attempted to impede its employees' exercise of their rights to choose a bargaining representative, Virginia Ry. v. System Federation, 300 U.S. 515 (1937), and an employer who unilaterally attempted to raise its employees' wages after refusing to bargain with their representative, May Dept. Stores Co. v. NLRB, 326 U.S. 376 (1945). These cases are clearly inapposite to the problem presented here.

§ 108 (1958), and therefore the remedy of an injunction is unavailable to it. That Section provides, *inter alia*, that no injunction should be granted to a complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." Eastern contends that the union's repeated past refusals, before it went on strike, to submit to mediation or arbitration at the exhortation of various high government officials is fatal to its cause.[21] See *Brotherhood of R.R. Trainmen* v. *Toledo P. & W. R.R.*, 321 U.S. 50 (1944). However, on the view of the case already taken, it is not necessary to explore this argument.

On the record before me made by the parties on this motion for a preliminary injunction, I do not feel that the Flight Engineers have shown by "clear and convincing" facts, see *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, *supra* at 793, that Eastern's actions have violated their legal rights, or that they have a reasonable probability of success in final hearing on these points. *Id.* at 795. Accordingly, under all the circumstances, the motion for preliminary injunction should be denied.

The foregoing shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a), 28 U.S.C.

Settle order on notice.

Dated: New York, N. Y.
August 10, 1962

WILFRED FEINBERG
U. S. D. J.

[21] See text at p. 8, *supra*.

APPENDIX C

Pertinent provisions of the Railway Labor Act referred to in the petition are as follows:

Section 2, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 5:

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or establish practices in effect prior to the time the dispute arose.

Section 6:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the

Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Section 10:

"SEC. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

"There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 776

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO, *Petitioner*,

v.

EASTERN AIR LINES, INC., *Respondent*.

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE APPENDED BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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Comes now the Railway Labor Executives' Association and moves the Court for leave to file the appended brief as amicus curiae in support of the petition for a writ of certiorari filed by Flight Engineers' International Association, EAL Chapter, AFL-CIO. The consent of the petitioner has been obtained; the consent of the respondent was requested but was refused.

The Railway Labor Executives' Association is an unincorporated association with which are affiliated twenty-four standard labor organizations that are the duly authorized and designated collective bargaining representatives under the Railway Labor Act of almost all the country's railroad employees. The labor organizations affiliated with the Association are:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employes' and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates and Pilots, Inc.
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers

This Court has repeatedly recognized Railway Labor Executives' Association as a proper party to appear and speak for its affiliated labor organizations and the railroad employees they represent in collective bargaining. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950); *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957).

This case turns upon the construction and application of several provisions of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*), especially Section 2, Seventh and Section 6. These are the fundamental provisions of the Railway Labor Act governing the procedural requirments for changing rates of pay, rules, and working conditions of railroad and airline employees. The resolution of the questions presented are thus of fundamental importance to the Railway Labor Executives' Association, its affiliated unions, and the employees they represent. The petitioner in this case, a single union representing exclusively airline employees, and which is not affiliated with the Association, cannot represent the interests of the railroad employees who have been governed by the Railway Labor Act and its antecedents for years before the Act was made applicable to the airline industry. The Railway Labor Act, as rewritten in 1934, was enacted at the request of the railroad unions before it was made applicable to the airline industry. The petitioner must direct its attention to the specific detailed facts presented in this case, while the Association can concentrate on the impact of the decision below on all railroad labor and its potential of disruption of the conduct of collective

bargaining as it has traditionally been conducted in the railroad industry under the Railway Labor Act.

WHEREFORE, Railway Labor Executives' Association moves that leave be granted to file the brief appended hereto, as amicus curiae, in support of the petition for a writ of certiorari.

Respectfully submitted,

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February 5, 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 776

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO, *Petitioner*,

v.

EASTERN AIR LINES, INC., *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF PETITION

INTRODUCTORY STATEMENT

Railway Labor Executives' Association submits this brief in support of the petition for a writ of certiorari pursuant to leave of Court.

The composition of the Association and its interest in this case, are set forth in the preceding motion.

REASONS FOR GRANTING THE WRIT

1. *The Importance of Reviewing the Decision Below.* For at least three decades labor negotiations in the railroad industry have been conducted on the understanding that, as specifically provided in section 2, Seventh and Section 6 of the Railway Labor Act (45 U.S.C. §§ 151 et seq.), a carrier could not lawfully make a unilateral change in rates of pay, rules, or working conditions unless the change were contained in a notice served by the carrier in accordance with section 6 and processed in accordance with the provisions of the Act. Never until the decision below in this case had any appellate court held, so far as counsel can determine, that if the collective bargaining representative so much as talks to a carrier about changes not contained in a section 6 notice the carrier may thereafter unilaterally install such changes.

The Railway Labor Act is premised on the philosophy that by requiring formal notice of intended changes, and by promoting the facilities for and the requirements of the parties talking about their disputes, disagreements would more likely be harmonized and peaceful relations furthered. But under the holding below, if the union discusses a change desired by a carrier which has not been served in accordance with section 6, the carrier may thereafter unilaterally make such change despite the specific prohibition of section 2, Seventh that "no carrier . . . shall change the rates of pay, rules, or working conditions of its employees . . . except in the manner prescribed in such agreements or in section 6 of this Act."

If the decision below is to be the law of the land, it should become such only after review by this Court. Under such state of the law, a party would no longer

feel free to discuss any suggestions that might arise in the course of negotiations or mediation but which had not been included in a section 6 notice for fear of having "waived" the procedural protection of the Act before the other party could resort to self-help. This could well result in the stifling of free discussion and in a complete disruption of what has heretofore been the accepted principles of negotiations and mediation.

2. *The Decision Below Is in Conflict with Decisions of Other Federal Courts and is Wrong.*

The Petition points out the conflict between the decisions below in this case and decisions of federal courts in other jurisdictions. Obviously, in an industry like the railroad industry, where it is commonplace to have collective bargaining on a national or regional basis, the parties cannot be bound to different procedural requirements dependent on the different interpretations given the same Act in different jurisdictions.

The decision below is plainly wrong. The opinion concedes that the "formal technicalities" (Pet. p. 14a) were not fulfilled, that there was a "technical deficiency" and a "technical omission" in the manner in which the respondent proceeded (Pet. pp. 13a, 14a), and that there was a "technical omission to comply with the formalities of the Act." (Pet. p. 14a) But it concludes that to vitiate the carrier's conduct for such reasons "would give precedence to form over substance". Pet. pp. 13a-14a.

Such language misconceives the climate and history of bargaining under the Railway Labor Act. The procedures specified in the Act are not mere "technicalities"; they are the prescribed regimen of lawfulness.

in making unilateral changes in rates of pay, rules, and working conditions. The opinion below acknowledges that the Act does not provide for "waiver" of the statutory procedures, but finds that they nevertheless may be waived. In relying on *Childers* v. *Bro. of R. Trainmen*, 192 F. 2d 956 (8th Cir. 1951), for such proposition, it misconceives that case and the purpose behind the Railway Labor Act.

In that case the union and the carrier made an agreement without a section 6 notice having been served, and such agreement was sustained against a challenge of its validity by employees who contended that it was invalid because not entered into pursuant to a section 6 notice. But the important fact in that case was that an agreement was reached by the duly authorized representatives of the employees and of the carrier. The purpose of the Railway Labor Act is to promote agreement, and where agreement is reached it matters little or nothing what procedures were followed so long as there is good faith. But such holding is hardly authority for the proposition that a carrier may resort to self-help in changing the rules governing employment unilaterally, without agreement, without following the prescribed procedures, or for the proposition that by talking about a proposal of a carrier not presented in a section 6 notice a union waives the procedures of the Act.

CONCLUSION

The decision below approves a method of changing rates of pay, rules, and working conditions otherwise than as permitted by the Railway Labor Act and admittedly in "technical" violation of the express commands of that Act. Such holding, if permitted to stand,

would result in far-reaching changes in collective bargaining in the industries governed by that Act. Whether the requirements of the Act may so be departed from raises a question of such importance that it should be reviewed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962

No. 776

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO,

Petitioner,

—v.—

EASTERN AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the Court below (Pet. A, p. 1a) is reported at 307 F. 2d 510. The opinion of the District Court (Pet. App. 2a-21a) is reported at 208 F. Supp. 182.

Jurisdiction

The judgment of the Court below was entered on August 30, 1962. By an order dated November 23, 1962, the time for filing a petition for a writ of certiorari was extended to and including January 26, 1963. The petition was filed on January 26, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

Question Presented

The Courts below found that the parties had negotiated with each other concerning the problem of crew complement on aircraft since February, 1961, after petitioner had conducted a strike over this issue; that the problem was also handled in mediation and by a Presidential Commission and a Presidential Emergency Board; that petitioner rejected arbitration and called a second strike beginning June 23, 1962, with crew complement as the crucial issue; and that respondent, after its airplanes had been idled for almost a month by the later strike, commenced operations under crew complement arrangements to which the striking petitioner had not agreed but as to which the procedures of negotiation, mediation and Emergency Board under the Railway Labor Act, had been exhausted. The dispositive question presented is whether, in these circumstances, the two Courts erred in finding that the procedures of the Railway Labor Act had been exhausted and that respondent's crew complement changes, like petitioner's second strike, were therefore permissible.

Additional Statement of the Case

"Judge Feinberg's thorough and well reasoned opinion"—as it was characterized by the Court below, which adopted its reasoning in the *per curiam* affirmance (Pet. App. 1a)—states in careful detail the facts of the case, in which he found no warrant for the preliminary injunction petitioner sought (Pet. App. 2a-9a). Respectfully referring to that account as ample basis for appraising the petition, we merely note here some of the central facts omitted from petitioner's incomplete and undocumented Statement.[1]

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[1] As the District Court observed (Pet. App. 2a, fn. 1), petitioner submitted only the verified complaint on its application

While it is based upon the claim that the issue of crew complement has never been processed under the Railway Labor Act since the Section 6 notices of February 1960, and that "self-help" on this issue has therefore remained forbidden, the petition omits the fact that petitioner struck respondent on this issue on February 17, 1961 (Pet. App. 4a). Likewise omitted by the fourteen-month gap the petition leaves between July 1960 and September 5, 1961 (see Pet. 5, first paragraph), is the fact that a Presidential (Feinsinger) Commission was created to end the February 1961 strike and "to make recommendations with respect to a settlement of the parties' dispute over the crew complement problem" (Pet. App. 4a). The Commission first reported on May 24, 1961, and again on October 17, 1961, and negotiations, mediation and Emergency Board proceedings between the parties from that time on concerned the issue of crew complement as well as other issues (Pet. App. 4a-5a).

After the statutory and extra-statutory efforts of the National Mediation Board and the Feinsinger Commission failed to produce a settlement, petitioner served a strike notice on February 21, 1962. The President appointed an Emergency Board which, in this final stage of the Railway Labor Act's procedures (Sec. 10, Pet. App. 23a), considered the "critical" issue of crew complement and recommended implementation of the Feinsinger Commission's recommendations (Pet. App. 5a). Further negotiations and mediation sessions were unsuccessful; petitioner rejected arbitration, even when it was proposed by the President; it served another strike notice; and the strike commenced on June 23, 1962 (Pet. App. 5a-6a).

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for a preliminary injunction. Thus, the findings below rest largely upon the detailed and uncontroverted affidavit in opposition (*Ibid.*).

Thus, in the words of the District Court, crew complement and related issues were "the crucial elements of the dispute which divided the parties during the extensive bargaining since February 1961, when the Flight Engineers actually went out on strike because of these issues" (Pet. App. 13a). In addition, "it is clear that the primary cause of this labor dispute and the current strike was the crew complement problem and its related issues" (*Ibid.*). And "these issues have been a subject of negotiation since February 1961, and as to them, the processes of the Act have been exhausted" (*Ibid.*).

After the second strike on this "primary cause" had been in progress for a month—causing the substantial injuries to respondent, its employees and the public mentioned in the District Court's opinion (Pet. App. 8a-9a)—respondent resumed limited operations, inaugurating crew complement changes to which the striking petitioner had not agreed, but which had been offered to petitioner and subjected to all of the procedures of the Railway Labor Act.[2]

Reasons for Denying the Writ

All three of the questions petitioner proposes (Pet. 2) rest upon the false premise that the courts below held it unnecessary to exhaust the procedures of the Railway Labor Act before resorting to "self-help" in the form of either

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[2] Even more strikingly than the petition, the proposed brief *amicus* of the Railway Labor Executives' Association, to which respondent has not consented, handles the material facts of this case by wholly ignoring them. It pretends (p. 6) that the decision below stands for the absurd proposition that a representative waives a Section 6 notice if it "so much as talks to a carrier about changes. . . ." Building upon such patent misrepresentations of the decisions of the Courts below, this *amicus* presentation could serve no useful purpose.

a strike or unilateral changes in working conditions. It is clear, however (see, e.g., Pet. App. 11a, 13a-14a), that the decision below fully recognizes this exhaustion requirement and finds it satisfied in the circumstances of this case. This conclusion, essentially factual in nature and hinged to the particular details of this controversy, is decisively supported by the record. If its correctness were more doubtful, however, it would present no problem of general importance. And there is nothing approaching a conflict of decisions. In short, we submit, there is no occasion for further review of this denial of a preliminary injunction, which petitioner sought on the bare generalities of a verified complaint.

1. On the facts sketched above and more fully reviewed by the District Court (Pet. App. 2a-9a), it is clear that few major disputes under the Railway Labor Act have been more thoroughly subjected to the statutory procedures than this one. Not one, but two Presidential bodies have considered the crew complement issue. It had been negotiated for a year and a half and handled to unsuccessful termination by the National Mediation Board; and it had led to two strikes by petitioner, the second of which had already lasted almost a month before respondent undertook to operate its airline with the crew complement changes of which petitioner complains.

In such circumstances, it seems bizarre to contend, as petitioner does, that the statutory procedures have not yet even begun with respect to crew complement because the general notices served under Section 6 back in February 1960 were not sufficiently specific. As the District Court observed in passing (Pet. App. 14a), even this hypertechnicality "may have" been erased by petitioner itself when it made more detailed proposals on April 1, 1960.

referring to questions of crew complement.[2] But there is no need to labor this alternative ground. The sufficient fact is that *both* parties have proceeded with a clear recognition that the statutory procedures have been exhausted with respect to crew complement—petitioner by striking on this "crucial" issue (Pet. App. 13a) and respondent by taking the unilateral measures now questioned.

Indeed, the only extraordinary thing about this case is petitioner's bland charge of unlawful self-help after its second strike on the question had already lasted almost a month. As the District Court noted (Pet. App. 11a), it is elementary that the prohibition against premature unilateral action cuts both ways. Petitioner's thesis is that the Railway Labor Act forbids respondent even to try to operate without the strikers. The Courts below were on solid ground in refusing to hold that the Act "stacks the deck" (Pet. App. 13a) in any such incredible fashion.

2. Petitioner finds a second certiorari question (Pet. 2, 12-17) in a paragraph of the District Court's opinion (Pet. App. 14a-15a) saying "it can be argued that" petitioner waived any supposed "technical deficiency" by proceeding to negotiate and mediate the matter of crew complement. While this suggestion of an alternative ground seems wholly correct, it could hardly suffice as an independent basis for review by this Court. Moreover, the skimpy record on which petitioner has chosen to proceed would be unsuitable

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[2] Gratuitously and mistakenly charging "misrepresentation of the facts by Eastern on oral argument" (Pet. 4, fn. 3), petitioner says the District Court was wrong in this respect and proceeds to offer characteristically undocumented explanations about matters of non-record fact. It is plain, however, that the District Court was suggesting a sound inference from the documents before it. And this is obviously not the occasion for responding to the kind of factual addenda petitioner offers.

for further exploration of such a largely factual issue, even if this issue were more essential than it is to the decision below.[4]

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[4] Petitioner attempts to give credence to its argument on "waiver" by pretending (Pet. 12-13) that bargaining over crew complement issues occurred only "at the behest of the carrier", and that (Pet. 2) such issues were "unilaterally injected by the carrier over the protest of the Union". Thus petitioner seeks to create the impression (Pet. 14-16) that it was not on notice that the crew complement question was a major issue in negotiations, that petitioner "concentrated on the 'economic' issues" while respondent "concentrated its efforts upon the 'crew complement' issues" and that petitioner never realized that the crew complement issues might become a subject for self-help after an impasse was reached in negotiations. The fiction of petitioner's contentions is revealed by the District Court's findings (based on uncontroverted evidentiary materials) that *petitioner* injected the crew complement issues into the negotiations by its strike of February 1961 (Pet. App. 3a-4a); that the Feinsinger Commission was established at that time "to make recommendations with respect to a settlement of the parties' dispute over the crew complement problem" (Pet. App. 4a); that both petitioner and respondent "participated in the hearings before the Feinsinger Commission" (*Ibid.*); that after the Feinsinger Commission made its final recommendations in October 1961 "negotiations between Eastern and the Flight Engineers were concerned not only with the issues originally raised by the 'section 6' notices but also with the crew complement issue," negotiations concerning such matters being "carried on both under the auspices of the National Mediation Board at that agency's request, and also with the assistance of Professor Feinsinger and Undersecretary of Labor Willard Wirtz" (Pet. App. 4a-5a); that the Emergency Board in 1962 received evidence and heard testimony concerning the crew complement issue and found it to be a "critical part of this dispute" (Pet. App. 5a); that in further negotiations on the subject petitioner told respondent "that any new agreement had to provide that all men hired by Eastern in the future must have the A&P license" (Pet. App. 6a); that petitioner specifically recognized the importance of the crew complement issue by expressly excluding it from a proposal to submit other issues to arbitration (*Ibid.*); that immediately after the strike started petitioner rejected an offer to settle on the same basis as a settlement at Trans World Airlines because petitioner "would never give up the requirement of an A&P license" (Pet. App. 7a); that "the primary cause of this labor dispute and the current strike was the crew complement

3. Similarly, there is no need to reach petitioner's third question (Pet. 2), which, again, rests upon the assumption that respondent "has not complied with the procedures . . . of the Act" prerequisite to changes in working conditions. The fallacy in this assumption, already noted, also explains petitioner's rather prolific citation of assertedly conflicting decisions (Pet. 9, 11, 17). All of the cited cases, on totally different facts, stand for the proposition—here undisputed—that a carrier may not ignore the procedures of the Railway Labor Act in making or threatening changes in collective agreements. There is still less merit in petitioner's claim (Pet. 18-19) that the Court below in this case created a "conflict" with its own decision a month earlier in *Pan American World Airways, Inc.* v. *Flight Engineers' International Assn., PAA Chapter*, 306 F. 2d 840 (2d Cir. 1962). That decision, vindicating the right of petitioner's sister local to strike despite a carrier's claim that there had been no Section 6 notice concerning crew complement, is wholly harmonious with, and serves to support, this one (see Pet. App. 11a-13a).

'problem and its related issues" (Pet. App. 13a); and that on July 24, 1962, petitioner itself recognized the crew complement issue as being crucial by proposing that the strike be settled on the basis of an agreement "regarding the crew complement issues within the framework of the already agreed-upon basic issues" (Pet. App. 8a). These high lights of the year and a half in which the crew complement issue was thoroughly negotiated, discussed and mediated reveal the absurdity of petitioner's claim that it was not on notice that the issue existed and that both parties could not resort to self-help after impasse. Add to this undisputed history the fact that petitioner does not even now challenge the District Court's finding that the crew complement issue was the real cause for the strike on June 23, 1962 and it becomes still clearer that the District Court correctly held that petitioner had waived any possible objections to "notice" concerning the crew complement issue.

CONCLUSION

The decision below is correct and there is neither a conflict of decisions nor any other reason for further review of petitioner's motion for a preliminary injunction. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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